IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2008 Session

LARRY RICHARD BRYANT v. BETH RACHELLE BRYANT

Appeal from the Chancery Court for Montgomery County
No. MC CH CV DI 06-0000373 Laurence M. McMillan, Jr., Chancellor

---

No. M2007-02386-COA-R3-CV - Filed September 16, 2008

The mother of the parties' only child appeals the designation of Father as the primary residential parent and the division of marital property. She also contends there was evidence of possible child abuse and that the trial court failed to make specific findings of fact pursuant to Tenn. Code Ann. § 36-6-106(a)(8). We affirm the designation of the father as the primary residential parent and the division of the marital property. We also find that the trial court was not required to make findings of fact because the mother made no allegations of abuse in her pleadings and the record contains no evidence of abuse. We also find that the father is entitled to recover reasonable and necessary attorney's fees incurred on appeal pursuant to Tenn. Code Ann. § 36-5-103(c).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Irene R. Haude, Nashville, Tennessee, for the appellant, Beth Rachelle Bryant.

Mark R. Olson, Clarksville, Tennessee, for the appellee, Larry Richard Bryant.

OPINION

Larry Bryant (Father) and Beth Rachelle Bryant (Mother) were married on January 3, 2004. On June 19, 2006, after only two years of marriage, Father filed for divorce citing irreconcilable differences and inappropriate marital conduct as the grounds for divorce. Mother timely filed an Answer and Counter-Complaint. In her Answer, she acknowledged that irreconcilable differences existed but denied allegations of inappropriate marital conduct. The matter went to trial over several days from May of 2007 until September 12, 2007.

The parties' child was born in July of 2002. At the time of her birth, Mother and Father were residing together in Tennessee Ridge, Tennessee. Mother's two children from a previous marriage also resided with them. The parties separated in May of 2006. Following their separation, a custody schedule was put into place where the parents shared custody of their minor daughter equally, each

parent having custody for a week at a time, and exchanging custody on Fridays. This visitation schedule worked well until shortly before Father's visitation prior to Christmas of 2006 when Father received a letter from the Department of Children's Services (Department) stating that a referral had been made and due to this referral an investigation concerning alleged sexual abuse against his daughter would commence. As a consequence, Father was denied visitation, and all access to his daughter, including phone contact, until three weeks later when the Department notified the parties that the allegation was unfounded and that Father's visitation should resume "immediately."[1] Father's weekly visitation resumed on January 6, 2007, and continued throughout the trial.

The testimony at trial was controverted and contentious. Father introduced evidence showing that during the marriage he had the primary responsibility of caring for their child. His testimony was supported by medical records from Centennial Pediatrics, the child's pediatrician, which showed that Father was the parent who brought the child for the vast majority of her appointments. Testimony also demonstrated that Father's few absences from work were due to his caring for his daughter when she was sick. The testimony also revealed that Mother was engaged in adulterous behavior and that Father would babysit the parties' minor child and Mother's two children from her previous marriage while she engaged in adulterous behavior. Evidence was also introduced that Mother had made several attempts to interfere with Father's scheduled visitation during the pendency of the divorce.

For her part, Mother alleged that Father had an alcohol problem. Although no evidence was presented indicating child abuse of any fashion, Mother implied through unfounded hearsay that was not admissible, principally by references to the fact the Department had opened an "investigation," albeit short lived, that Father may have abused their child. Significantly, no one, not even Mother, testified as to any abuse. Moreover, her pleadings contained no allegations against Father of child abuse. To the contrary, Mother recommended in her pleadings that the parents share parenting time.

Mother also alleged that the paternal grandfather's home, where the minor child often stayed while Father was at work, was unsafe. Her testimony, however, was convincingly refuted by the grandfather who established that prior to the divorce the parties' child, as well as Mother's other two children, would stay with him at Mother's request when she needed someone to watch them.

The testimony revealed that the parties owned little marital property of value, with the exception of the marital residence and Father's 401k plan. The biggest points in contention relative to marital property pertained to Father's 401k plan and whether he had "borrowed" $10,000 from his plan to facilitate the purchase of the marital residence. Father testified that he had applied the

[1] It is undisputed that an investigation was opened and closed; however, no one testified about the investigation or the findings of the Department. The only information in the record regarding an investigation comes from the Department's letter, dated January 5, 2007, addressed "To Whom It May Concern," which states that the investigation was "closed," that the allegations were "unfounded," that the results of the "interviews have not concluded any concerns of . . . abuse." The letter goes on to state, "Due to the findings of this investigation, it is without further delay that visitation between, [the child] and [Father] should resume. In an effort to further reduce trauma to [the child], it is the Department's recommendation that the above-mentioned happen IMMEDIATELY."

funds as a loan, approximately $11,500, and that funds were being withheld from his paycheck and being applied to pay the loan. Mother introduced evidence challenging Father's testimony as to the alleged loan and repayment protocol. She insisted the 401k had increased by at least $10,000 during the marriage due to payroll contributions, and thus the increase constituted marital property, and thus she was entitled to an equitable share of the increase in the 401k. Mother also testified that Father had removed $7,000 worth of personal property from the marital residence when he left, which she contended should be considered in the division of marital property. Father denied taking property of that value and stated the property he took when he left was his or that it was with Mother's consent.

The trial court announced its ruling from the bench at the conclusion of the trial. Significant to the matters at issue on appeal, the trial court found that Mother's testimony was not credible and the court stated that this finding "weighed significantly" on the court's decisions.

The Final Decree of Absolute Divorce was entered on September 24, 2007. In the Decree, Father was designated as the primary residential parent of their minor daughter. Mother was awarded parenting time of one weekend a month due to the fact she had moved to live in a community near Memphis, Tennessee. Holidays and summer vacation were divided equally between the parents.

In the property division at issue, the trial court found that funds from Father's 401k had been applied as a loan on the marital residence, as Father had testified, and the court found that the amount of the loan was relatively equal to the amount of appreciation in the 401k during the marriage. Therefore, the court ruled that Mother was not entitled to any amount of the 401k. The trial court did not make an award relative to Mother's claim that Father had removed $7,000 of personal property. This appeal followed.

Mother contends the designation of Father as the primary residential parent, the division of property regarding Father's 401k, the failure to award compensation for $7,000 worth of property, and the failure of the trial court to make findings under Tennessee Code Annotated § 36-6-106(a)(8) constitute error. She also contends that her appellate counsel, who was not her counsel at trial, has been denied access to the Department's records and therefore the trial court's decision should be reversed.

For his part, Father seeks to recover the attorney's fees he has incurred on appeal.

ANALYSIS

We will first review the issues concerning the Department's records, then whether the trial court was required to make findings concerning abuse, and then we will discuss the remaining issues in turn.

THE DEPARTMENT'S RECORDS

The issue regarding the Department's investigation file arises because Mother changed counsel following the adverse ruling in the trial court. Mother contends her appeal has been impaired because her new counsel has not reviewed the Department's file. We find no merit to this argument.

Three factors make this argument without merit. One, the parties entered an Agreed Protective Order in the trial court placing the Department's file under seal. Two, the Order expressly provided that counsel could examine the file upon request. Mother's counsel did not request to examine the Department's file. Three, neither party introduced, or asked to introduce, any portion of the Department's file at trial. Thus, Mother waived any right she (or her counsel) may have had to examine the Department's file.

There is another reason this issue is without merit. Pursuant to Tenn. R. App. P. 13(c), this Court may only consider evidence that is considered by the trial court and set forth in the record, or evidence that was erroneously excluded at trial. Mother did not proffer any part of the Department's file into evidence at trial and the trial court did not consider nor erroneously exclude any part of the Department's file. It is, therefore, irrelevant whether Mother's appellate counsel has reviewed the file because her counsel may not include any part of the file in her brief or argument to this court (because it is not in the record) and, more importantly, we may not consider it.

WHETHER FINDINGS OF FACT WERE REQUIRED

Mother contends the trial court was required to make specific findings of fact pursuant to Tenn. Code Ann. § 36-6-106(a)(8). We find no merit to this argument for three reasons. One, the statute Mother relies on, Tenn. Code Ann. § 36-6-106(a)(8), is not applicable to this action. Two, there are no allegations of abuse in the pleadings. Three, there is no evidence of abuse in the record.

If Tenn. Code Ann. § 36-6-108(a)(8) were applicable and there were allegations or evidence of abuse, then the trial court would be required to consider all relevant evidence and "*include in its decision a written finding of all evidence, and all findings of facts connected to the evidence.*" Tenn. Code Ann. § 36-6-108(a)(8) (2005) (emphasis added).[2] However, we recently determined in *Cain*

---

[2] Tenn. Code Ann. § 36-6-108(a)(8) (2005) states:

> Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that, where there are allegations that one (1) parent has committed child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected to the

(continued...)

v. Cain, No. M2006-02259-COA-R3-CV, 2008 WL 2165963 (Tenn. Ct. App. May 16, 2008) (no Tenn. R. App. 11 application filed), that but for two exceptions, neither of which apply to this case, Tenn. Code Ann. § 36-6-106(a)(8) no longer applies to divorce actions involving minor children. Instead, Tenn. Code Ann. § 36-4-404 is the applicable statute and, significantly, § 36-4-404 does not require a court to make specific findings of alleged abuse. *Cain*, 2008 WL 2165963, at *5 (citing Tenn. Code Ann. § 36-4-404(b)(12) (holding the statute "does not require the court to determine whether abuse occurred and does not require specific written findings"). When deciding on a parenting plan under the criteria of Tenn. Code Ann. § 36-4-404(b)(12), the trial court is to "consider," *inter alia*, evidence of "physical or emotional abuse to the child, to the other parent or to any other person . . ."; however, findings of fact are not required. Tenn. Code Ann. § 36-4-404(b)(12); *Cain*, 2008 WL 2165963, at *5.

The issue in *Cain* was whether the trial court was required to make written findings regarding alleged abuse. Unlike here, there was evidence of abuse in *Cain*; thus, the court was to "consider" the evidence regarding the actions characterized as abuse. *Id*. at *4. After analyzing whether the type of allegations made in *Cain* invoked the duty to make findings,[3] the court considered whether written findings were required in divorce actions occurring after July 1, 1997. The court analyzed the issue as follows:

> [T]here is some question as to whether Tenn. Code Ann. § 36-6-106 even applies in this case. That is because the divorce herein occurred after the effective date of the parenting plan legislation, Tenn. Code Ann. §§ 36-6-401 *et seq*. Pursuant to Tenn. Code Ann. § 36-6-404(a), any final decree in an action for absolute divorce involving a minor child must incorporate a permanent parenting plan. A parenting plan is defined in Tenn. Code Ann. § 36-6-402(3) as "a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a Residential Schedule." [footnote omitted]
> . . . .
>
> Thus, the parenting plan legislation does not use the terms "custody" or "visitation," but instead establishes a parenting arrangement based on a schedule of when the child will reside with each parent. While the parenting plan legislation did not explicitly repeal the prior statutes on custody and visitation,[4] it is clear that the legislature

---

[2](...continued)
evidence. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings.

[3]The court concluded "that the allegations made by Father did not require the specific findings set out in Tenn.Code Ann. § 36-6-106(a)(8)." *Cain*, 2008 WL 2165963, at *4.

[4]There are circumstances where the "custody" statutes still apply. For example, Tenn. Code Ann. § 36-6-404(a) does not include parentage orders, as distinguished from divorce decrees, in the requirement for a parenting plan; nor does that requirement apply to agreed orders of modification of a custody order entered in a divorce prior to July 1, 1997.

> intended that courts (1) adopt permanent parenting plans in all divorces involving minor children; (2) not award "custody" or "visitation" in cases where a parenting plan is required; and (3) apply a specific set of factors, included in the parenting plan legislation, when approving or designing a permanent parenting plan. *See* Tenn. Code Ann. § 36-6-404(b). *The factors that the court is explicitly directed to consider regarding a permanent parenting plan apply herein* and in other cases where the court is statutorily required to enter a parenting plan, *not the factors set out in Tenn. Code Ann. § 36-6-106(a)(1)-(10)*, which explicitly apply to custody determinations. *While there is little substantive difference in the two sets of factors as far a comparative fitness is concerned, the issue in the case before us requires that we examine the parenting plan statutes for any requirement of specific findings comparable to that in Tenn. Code Ann. § 36-6-106(a)(8).*

Cain, 2008 WL 2165963, at *5 (emphasis added). After the *Cain* court examined the parenting plan at issue, the court stated "the statute applicable to a residential schedule in a permanent parenting plan . . . *does not require specific findings* of the type Mother insists should have been made." *Id*. at *6 (emphasis added).

As the court in *Cain* correctly determined, Tenn. Code Ann. § 36-6-404(a) applies to divorce actions involving minor children occurring after July 1, 1997, unless the parties present an agreed order of modification of a custody order. Moreover, and significant to the matter at issue, Tenn. Code Ann. § 36-6-404(a) does not require a trial court to make specific findings even if abuse is alleged or if there is evidence of abuse. Allegations and evidence of abuse are certainly to be considered by the court, but findings are not required under Tenn. Code Ann. § 36-6-404(a). We, therefore, find Mother's assertion that the trial court erred by not making specific findings concerning abuse without merit as a matter of law.

Aside from the fact the applicable statute did not require the trial court to make findings, Mother made no "allegations" of abuse in her pleadings. Moreover, there is no evidence of abuse in the record. The only "hint" of such to be found in the record arises from Mother's hearsay references to an "investigation" by the Department. This investigation is only evident from one letter that was introduced for identification only, which stated that a brief investigation occurred, the undisclosed allegations were "unfounded," and the Department closed its file with the express recommendation that Father's visitation be restored "immediately." The simple fact is there are no "allegations" of abuse in the pleadings and there is no evidence of abuse. Accordingly, there would be no basis upon which to assert that the trial court had any duty to make findings of fact had Tenn. Code Ann. § 36-6-106 applied.

We also find that Mother's testimony at trial undermines her zealous argument concerning this issue. Her trial testimony clearly indicated that her concern with Father's parenting skills related to an alleged problem with alcohol and, as we noted earlier, there is no testimony concerning alleged abuse.

We, therefore, conclude the trial court was not required to make specific findings of fact concerning the phantom issue of abuse.

THE PRIMARY RESIDENTIAL PARENT

Mother contends the designation of Father as the primary residential parent was error. We find no error.

Both parties erroneously rely on the criteria set forth in Tenn. Code Ann. § 36-6-106 in their arguments concerning the designation of the primary residential parent. As discussed above, the issues concerning the primary residential parent and the parenting plan are controlled by Tenn. Code Ann. § 36-6-404, not Tenn. Code Ann. § 36-6-106. Accordingly, our analysis will be based upon the legal standard set forth in Tenn. Code Ann. § 36-6-404.

Pursuant to the statutory scheme, the trial court is required to adopt a parenting plan, which is defined by Tenn. Code Ann. § 36-6-402(3) as being "a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a residential schedule." In preparation of adopting a parenting plan, the court's first inquiry is to determine if one of the limiting factors set forth in Tenn. Code Ann. § 36-6-406 is present. *See* Tenn. Code Ann. § 36-6-404; Tenn. Code Ann. § 36-6-406 (2005). The statute provides that if any of the following factors are determined to be present, a parent's residential time should be limited: (1) Willful abandonment or substantial refusal to perform parenting responsibilities; (2) Physical or sexual abuse, or a pattern of emotional abuse as defined in §36-3-601. Tenn. Code Ann. § 36-6-406(a)(1)-(2) (2005). Additionally, the statute provides that the court has the discretion to limit parenting time if any of the following factors are found after a hearing: (1) Neglect or substantial nonperformance of parenting responsibilities; (2) Emotional or physical impairment that interferes with the parent's performance of parenting responsibilities; (3) Impairment resulting from drug, alcohol or other substance abuse that interferes with performance of parenting responsibilities; (4) Absence of substantial impairment of emotional ties between the parent and child; (5) Abusive use of conflict by the parent that creates the danger of damage to the child's psychological development; (6) A parent has withheld from the other parent access to the child for a protracted period without good cause; (7) Parent's criminal convictions as they relate to such parent's ability to parent or to the welfare of the child; or (8) Other factors or conduct court expressly finds adverse to the best interests of the child. Tenn. Code Ann. § 36-6-406(b)(1)-(8) (2005).

If no limiting factors outlined under Tenn. Code Ann. § 36-6-406 are dispositive of the child's residential schedule, then the court should look to the factors outlined under Tenn. Code Ann. § 36-4-404. In this case, there do not appear to be any limiting factors found by the trial court and thus we view the trial court's determination of the residential schedule in the parenting plan under the statutory factors.

Tenn. Code Ann. § 36-4-404(b) outlines fifteen factors and a sixteenth discretionary catch-all provision to be used in determining who should be named the primary residential parent within the residential schedule in the parenting plan. The factors are as follows:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
>
> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
>
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
>
> (4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;
>
> (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
>
> (6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
>
> (7) The love, affection, and emotional ties existing between each parent and the child;
>
> (8) The emotional needs and developmental level of the child;
>
> (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
>
> (10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
>
> (11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

(13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;

(14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

(15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and

(16) Any other factors deemed relevant by the court.

Tenn. Code Ann. § 36-4-404(b)(1)-(16) (2005).[5]

Decisions concerning parenting plans, as with custody and visitation decisions, are reviewed *de novo* with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols,* 792 S.W.2d 713, 716 (Tenn.1990). Furthermore, appellate courts are reluctant to second-guess a trial court's determination regarding the designation of the primary residential parent and parenting time. *See Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999) (dealing with custody and visitation). This is because of the broad discretion given trial courts in such matters. *Id.*; *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001) (dealing with child custody, visitation and related issues). Parenting decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion a parenting plan that best suits the unique circumstances of each case. *Parker v. Parker*, 986 at 563 (discussing custody and visitation). The trial court's decision regarding parenting plans will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). This is particularly true when no error is evident from the record. *Id*.

[5] As previously discussed, the parties used the factors listed under Tenn. Code Ann. § 36-6-106 in their arguments, as opposed to the foregoing factors. For purposes of this issue, the factors in Tenn. Code Ann. § 36-6-106 are not substantially different from those in Tenn. Code Ann. § 36-6-404; therefore the parties' confusion as to which statute applies is of no consequence. *See Cain*, 2008 WL 2165963, at *6 (citing *Burden v. Burden*, No. E2006-01466-COA-R3-CV, 2007 WL 2790674, at *7 (Tenn. Ct. App. Sept. 26, 2007) (no Tenn. R. App. P. 11 application filed) (determination of custody made in accordance with the factors in Tenn.Code Ann. § 36-6-106 and Tenn.Code Ann. § 36-6-401)).

The evidence relative to the designation of the primary residential parent and parenting time was mostly controverted. The record presents conflicting testimony between Mother and Father regarding who was the primary caregiver of their minor child and the better caregiver during their marriage. It is, therefore, most significant that the trial court made the finding that Mother lacked credibility and that this fact weighed heavily on the court's decision. The trial court was in the position to weigh the credibility of the witnesses and make a determination fully within its discretion of who should be designated the primary residential parent by taking that credibility into account. *See Nelson*, 66 S.W.3d at 901; *Adelsperger*, 970 S.W.2d at 485.

Based on the record and the standard of review we apply on appeal, we find no basis upon which to reverse the trial court's designation of Father as the primary residential parent or to modify the parenting plan.

DIVISION OF MARITAL PROPERTY

The division of the parties' marital estate begins with the classification of the property as separate or marital property. *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). Tennessee is a "dual property" state, *Smith v. Smith*, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002), thus, it cannot be included in the marital estate unless it is "marital property." The definition of that term is found in Tenn. Code Ann. § 36-4-121(b)(1)(A). "Separate property," as that term is defined in Tenn. Code Ann. § 36-4-121(b)(2), is not marital property. Therefore, separate property should not be included in the marital estate. *Woods v. Woods*, No. M2002-01736-COA-R3-CV, 2005 WL 1651787, at *3 (Tenn. Ct. App. July 12, 2005). Property classification is a question of fact. *Mitts v. Mitts*, 39 S.W.3d 142, 144-45 (Tenn. Ct. App. 2000). Thus, we review the trial court's classification using the familiar standard of review in Tenn. R. App. P. 13(d).

Once property has been classified as marital property, the court should place a reasonable value on property that is subject to division. *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003). The parties have the burden to provide competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values presented. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997). Decisions regarding the value of marital property are questions of fact, *Kinard*, 986 S.W.2d at 231; thus, they are not second-guessed on appeal unless they are not supported by a preponderance of the evidence. *Smith*, 93 S.W.3d at 875.

Once the marital property has been valued, the trial court is to divide the marital property in an equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Miller*, 81 S.W.3d at 775. A division of marital property in an equitable manner does not require that the property be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c). *Kinard*, 986 S.W.2d at 230. Trial courts have wide latitude in fashioning an equitable division of marital property, *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983) and this court accords great

weight to the trial court's division of marital property. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). Thus, we defer to the trial court's division of the marital estate unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence. *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

The marriage between Mother and Father was brief, lasting just over two years. The most substantial asset in the divorce was the marital home. It was sold and the proceeds were split equally. The parties retained their own vehicles. The only other asset of any value was Father's 401k which he started long before the parties' marriage, and he maintained the account in his sole name during the marriage. Mother contended that contributions made to the 401k during the marriage of approximately $10,000, which were from a marital asset – Father's salary – entitled her to a share of the account pursuant to Tenn. Code Ann. § 36-4-121(b)(1)(B).[6] Specifically, she contended she was entitled to an equitable division of the increase of $10,000. The trial court found that the contributions to the 401k during the marriage of approximately $10,000 constituted marital property; however, the court offset that amount against an obligation Father claimed he incurred during the marriage. This was based on the trial court's finding that Father had borrowed approximately $10,000 during the marriage, which he applied toward the down payment on the marital home. At issue is whether the trial court erred in finding that the increase in the 401k was offset by the loan amount.

In determining the equitable division of property, the court is allowed to take into consideration the financial liabilities of the parties. *See* Tenn. Code Ann. § 36-4-121(c)(2) (2005). "The division of marital property involves the distribution of both marital assets and marital debts." *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). "Marital debts are all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing." *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn. 2003).

The record does not clearly explain the loan at issue; however, that is not essential. What is important is whether the evidence does or does not preponderate against the trial judge's finding that the loan should be offset against the appreciation. We find the evidence does not preponderate against the trial judge's finding that the loan should be offset against the appreciation to the 401k account. Therefore, we find no error with this determination.

We also find no error with the trial court's decision regarding Mother's contention that she should have been compensated for $7,000 worth of personal property that Father allegedly removed from the home when they separated. Husband testified that the property he removed was his or that which the parties had agreed upon. Although the trial court did not specifically address this claim in its ruling, the claim is impaired by the fact it is a disputed claim which is based entirely on the credibility of Mother versus Father. The trial court made an express finding that Mother was not a

---

[6] Under Tenn. Code Ann. § 36-4-121(b)(1)(B) (2005), marital property "includes income from, and any increase in value during the marriage of . . . the value of . . . retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage."

credible witness, which we find dispositive of the issue. *See Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007) (citing *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991)) (holding that trial courts are in a far better position than this Court to observe the demeanor of the witnesses, determine the weight, faith, and credit to be given witnesses' testimony and the appellate court will give great deference to the findings of fact made by the trial court). Based on the trial court's credibility finding, we affirm the trial court's division of the marital estate.

ATTORNEY'S FEES

Father seeks to recover his attorney's fees on appeal. Tennessee Code Annotated § 36-5-103(c) provides

> the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Tenn. Code Ann. § 36-5-103(c) (2005).

"Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court." *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *6 (Tenn. Ct. App. Dec. 17, 2007) (citing *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995)). In determining whether an award is appropriate, we take into consideration the "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered." *Id.* at *6 (citing *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *10 (Tenn. Ct. App. Sept. 3, 2003)).

Father was designated as the primary residential parent by the trial court. This appeal pertains to the enforcement of that decision. Considering the relevant factors listed above, we find that Father is the prevailing party on the parenting (custody) issue, his income is $17,600 less than Mother's income, and all other equitable factors are in favor of an award to Father of his reasonable attorney's fees.

We, therefore, hold that Father is entitled to an award of attorney's fees that were reasonably and necessarily incurred on appeal. This issue is remanded to the trial court for a determination of the amount of fees Father is entitled to recover.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Beth Rachelle Bryant and her surety.

_____

FRANK G. CLEMENT, JR., JUDGE